Supreme Court, U.S.
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NO. 93 - 79

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BETTY EDWARDS,

Petitioner
Versus

ARLINGTON HOSPITAL ASSOCIATION
AND EVELYN VARDIMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF ON OPPOSITION

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QUESTIONS PRESENTED

I. Whether the statements made concerning the Petitioner constitute protected opinion or actionable defamation.

II. Whether the state court decision was based upon adequate, independent state grounds or upon federal law.

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BETTY EDWARDS filed her Petition for a Writ of Certiorari in this court on July 14, 1993. Respondents have filed a Brief in Opposition to the Petition, and the Petitioner hereby responds to certain issues raised by the Respondents in their Brief.

JURISDICTION

This court's jurisdiction to review the Virginia Supreme Court Order of April 16, 1993, is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

FIRST AMENDMENT TO U.S. CONSTITUTION

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The Petitioner fully set forth the facts of the case in her Petition For Writ of Certiorari. However, because Respondents, in their Brief In Opposition, have made certain factually inaccurate statements and have taken others out of context clarification of the facts is necessary.

Respondents assert, on page 5 of their

Brief, that Petitioner did not replace herself on the schedule for January, 1990 and that she went to Florida rather than undergo psychiatric treatment. The trial testimony not only from Petitioner but from Respondents' witnesses as well was that prior to going to Florida for a brief period of recuperation, Petitioner met with the then head nurse, Kim Donahue, fully explained her situation, was given full permission, and, in fact, encouragement, to take this time to recuperate. Moreover, Petitioner's testimony that during this time she was, in fact, receiving treatment from a psychiatrist, who had full knowledge of her trip was uncontradicted. Respondents assertion that she was not receiving treatment is, therefore, contrary to record evidence.

Additionally, testimony adduced at trial

was that Petitioner was told to contact the Hospital when she was ready to return to work. No indication was ever given to her that her job would be in jeopardy if she took this time off to recuperate. Rather, the indication was exactly the opposite.

While Petitioner was out of town, Evelyn Vardiman became the Head Nurse. When Petitioner returned, she learned that notwithstanding the fact that she had full permission to be away Evelyn Vardiman had dropped her from the register. This was tantamount to a termination, inasmuch as a nurse who is not on the register can not be called in for work. She was told in a brief meeting with Ms. Vardiman that the reason was unavailability. When Petitioner contacted Ms. Vardiman and asked for written reasons, her request was denied. Rather than provide

reasons to her, the notice was placed in the Communications Book for all staff employees to see as well as anyone else who happened to be in the staff lounge.

Respondents asserted, on page 6 of their Brief, that only three registered nurses saw the notice. This assertion is fallacious and contrary to record evidence. Respondents admitted in their answer filed with the trail court that another category of employee, i.e., therapists, had seen the notice. Moreover, there was testimony at trial that the Communications Book functioned as a bulletin board. Other employees' initials appeared in the Communications Book indicating that they had read the notices contained therein. Evelyn Vardiman herself testified at trial that she specifically placed the notice in the Communications Book so that it would be read

by all staff employees on every shift. (Tr. 510). Staff included not only registered nurses but many other categories of employees as well who had no duty or responsibility to call a nurse in for duty. (Petition at 11) In view of their pleadings and trial testimony, it is disingenuous for Respondents to now attempt to argue that the notice was only seen by three nurses and that their opinions of Petitioner were unchanged. Testimony adduced at trial was that a co-worker saw the notice, copied it verbatim, contacted the Petitioner and read it to her. Petitioner's co-workers read the notice to mean that Petitioner had been dropped because she was unreliable and had been counseled or reprimanded about her reliability on three prior occasions. Petitioner's co-workers also testified that they were surprised not only

because they viewed Petitioner as reliable but because of the open nature of this communication.

Further, because the trial court found that the statements in the notice constituted defamation per se, it is unnecessary for Petitioner to quantify her damages and show that opinions of her were, in fact, changed. However, the Petitioner testified that subsequent to the notice her former co-workers, whom she had regarded as friends, stopped calling her and had nothing further to do with her.

Petitioner adduced ample testimony at trial that her personal problems never interfered with her work performance. In her 1989 performance appraisal her reliability was rated as "outstanding." Evelyn Vardiman herself testified at trial, on cross-

examination, that prior to placing the notice in the Communications Book she sped read Petitioner's performance appraisals and concluded that her reliability had been outstanding (Tr. 540). She testified that her conclusion was that Petitioner was a good nurse, was doing a good job and that the staff felt that Petitioner was reliable (Tr. 539). She also conceded that reliability encompasses professional competence (App. at 4).

The evidence was uncontroverted that Petitioner never failed to contact the Hospital when she needed to be absent, that she sent in appropriate replacements when possible, although not required, that she had permission and, in fact, encouragement to be away beginning in January, 1990, and that no one ever told her that her job was in jeopardy for taking a recuperative period. Petitioner,

in terms of actual hours worked, ranked third out of twenty-six PRN nurses on the register in 1988, and in 1989 she ranked fourth out of twenty-six PRN nurses on the register.

ARGUMENT

I. THE STATEMENTS MADE CONCERNING PETITIONER CONTAINED PROVABLY FALSE FACTUAL CONNOTATIONS AND, THEREFORE, CONSTITUTE ACTIONABLE DEFAMATION, NOT PROTECTED OPINION.

The statements concerning Petitioner clearly contain provably false factual connotations. Any person reading this notice could reasonably deduce a myriad of adverse facts about the Petitioner, e.g. that she had mixed up patients' medications, failed to give necessary medications, or failed to follow doctors orders. Evelyn Vardiman admitted on cross examination that clinical competence was part of reliability. (App. at 4).

Because Ms. Vardiman did not designate in

the notice which parts of reliability were considered in removing Petitioner from the register, it is imperative to consider all aspects of reliability in determining that the statements contain provably false factual connotations. No limitation as to time frame or components of reliability was contained in the notice. Therefore, Petitioner's entire period of employment must be considered in making this determination as well as all aspects of reliability. Respondents have conceded in their memorandum filed with the trial court and in their arguments made to the court that the components of reliability are verifiable. It was uncontroverted at trial that Petitioner was a competent psychiatric nurse.

It should again be emphasized that the jury found that, based upon the evidence

adduced at trial, the statements made concerning the Petitioner were false. Respondent continues to argue that the statements were true. However, the issue is whether they can be characterized as true or false or whether they contain provably false factual connotations, not whether they are, in fact, false. The trial court did not set the verdict aside on the basis that the evidence adduced to prove the falsity of the statements was insufficient but rather on the sole basis that the statements were opinion.

In the Order, the trial court explicated that the statements were opinion <u>because</u> they were loosely definable and variously interpretable, could not be characterized as true or false, did not contain defamatory assertions of objective fact, and could not be proved true or false. In their Brief In

Opposition, at page 10, Respondents argue that the trial court did not simply label the statements as opinion but made additional findings based on the above criteria. The above criteria are all set forth in federal cases, Blue Ridge Bank v. Veribanc., Inc., 866 F. 2d 681 (4th Cir 1989), Potomac Valve and Fitting, Inc. v. Crawford Fitting Co., 829 F. 2d 1280 (4th Cir. 1987), Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). While these cases set forth criteria to be used to determine opinion versus fact, they are all predicated upon the federal right to free speech contained in the First Amendment to the United States Constitution.

II. THE STATE COURT DID NOT BASE ITS DECISION ON ADEQUATE, INDEPENDENT STATE GROUNDS.

As in the case of Michigan v. Long, 463 U.S. 1032 (1983), the trial court's decision

in the case herein involved the application and interpretation of federal case law. In this case, as in Michigan, there was a passing reference to the State Constitution in one of the cases cited by the trial court, Chaves v. Johnson, 230 Va. 112, 355 S.E. 2d 97 (1985). However, it is clear from reading the opinion Chaves that the decision was based upon federal law (Petition at 33-34). Respondents argue that the court's citation in Chaves to Thomas Jefferson's Inaugural Address supports their argument that there was an adequate, independent state ground for the decision. Petitioner contends that the citation in Chaves to Thomas Jefferson's Inaugural Address supports her contention that the Chaves decision was, in reality, based upon federal doctrine despite the passing reference to the Virginia Constitution. The court in Potomac

Valve also cited Thomas Jefferson's Inaugural Address and that case was unequivocally based upon the federal right to free speech. Moreover, the court in Chaves clearly relied upon the exact passage from Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), later determined by the court in Milkovich to be inappropriately relied upon in determining opinion versus fact.

Respondents argue that a commentator analyzing defamation cases in Virginia observed that the Chaves court predicated its decision on both the First Amendment to the United States Constitution and also on the Virginia Constitution. Petitioner contends that this court is certainly not bound by the speculations of a commentator when a fair reading of the Chaves opinion clearly indicates that it was, in fact, based upon

federal law. Moreover, the court in Michigan held that notwithstanding a passing reference to the State Constitution, the United States Supreme Court had jurisdiction to review the decision in the absence of a "plain statement that the decision below rested on an adequate and independent state ground." Michigan at 1031. The court in Michigan stated in pertinent part:

> The references to the State Constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law.

Michigan at 1031.

Similarly, the trial court in the case herein, in finding that the statements were protected opinion, relied upon the cases cited in Respondents' memorandum of points and

authorities. All cases relied upon by Respondents were federal except Chaves which was decided on federal law.

Respondents also cite Lapkoff v. Wilks, F. 2d 78, 81-82 (4th Cir 1992) to support their position that the decision in this case was based upon an adequate, independent state ground. While the court in Lapkoff was careful to state that it was relying upon state grounds to find that the statements at issue were protected opinion, it is dubious whether that was, in fact, the case. The court clearly applied the tests enunciated in federal case law, citing Ollman v. Evans, 750 F. 2d 970 (D.C. Cir (984) (en banc), and Potomac Valve & Fitting Co. v. Crawford Fitting, 829 F. 2d 1280 (4th Cir. 1987). The court in Potomac Valve specifically stated that the decision was based on the federal

right to free speech. In any event, the mere citation to Chaves in Lapkoff does not mean that the court in Chaves based it's decision on state rather than federal grounds.

Respondents, in their Brief at page 20, make the argument that had the Virginia Supreme Court accepted this case for review, it would have determined that there was no evidence to support the jury instruction as to abuse of qualified privilege, and that, therefore, there would have been an independent state basis for the decision. Petitioner contends that this is totally inappropriate speculation. However, such assertion is fallacious and contrary to record evidence. An abundance of evidence was adduced at trial to demonstrate abuse of privilege. Petitioner also contended in the Petition For Appeal that it was error for the

trial court to have found a qualified privilege. This was not a communication made to an employee by an employer, but rather a communication made about an employee to everyone except the employee. It could just as well be speculated that the Virginia Supreme Court would have found that no qualified privilege existed.

Evidence adduced at trial and arguments to the trial court regarding the abuse of privilege included the fact that the words used were stronger than the situation required, that there was undue publication of the statements, that Evelyn Vardiman did not believe the statements were true when she published them and published such statements with reckless disregard for the truth.

The testimony of Petitioner's witness was that Evelyn Vardiman confided to her that the

"real reason" for removing Petitioner was the fact that she made a suicide attempt. If that was characterized by Ms. Vardiman as the "real reason" then obviously she did not consider the reason placed in the notice as the real one. Additionally, Ms. Vardiman testified that prior to placing the notice in the Communications Book she had concluded that Petitioner's reliability had generally been outstanding, and that the staff felt she was reliable. (Tr. 539). Prior to publishing the notice, she did not talk with Petitioner concerning her situation or look at the number of hours she had worked compared to that of other PRN nurses.

The jury was asked to decide whether the statements made concerning the Petitioner were false and whether they were made with common law or actual malice. The response to both

questions was in the affirmative. The trial court did not set aside the verdict on the basis that the evidence of abuse of qualified privilege was insufficient, but on the sole basis that the statements were protected opinion.

CONCLUSION

For the reasons stated herein, the Respondents have failed to assert any valid basis for the denial of the Petition in this case.

Respectfully submitted,

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APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF ARLINGTON

BETTY EDWARDS,	:	
Plaintiff,	:	
vs.	:	AT LAW NO. 90-1254
ARLINGTON HOSPITAL ASSOCIATES, ET. AL.,	:	
Defendants.	:	

VOLUME 3

Arlington, Virginia

Monday, April 13, 1992

The trial commenced at 10:15 o'clock, a.m.

BEFORE:

The Honorable Benjamin Kendrick, Judge.

Reported By: Deborah A. Docteur

ACCURATE STENOTYPISTS, INC.
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. . . . . .

Q. Ms. Vardiman, would you agree that the word reliability encompasses much more than physically being on the job?

A. Yes.

Q. If a nurse, for example, gave the wrong medication to a patient, would you consider the nurse reliable or unreliable?

A. Well, I think it -- that kind of relates to clinical competence. And I would imagine it would depend on how many times she did that.

Q. You don't view clinical competence as being any part of the reliability?

A. It's a different issue, but yes, I would say --

Q. -- that clinical competence is part of the reliability?

A. Could be, yes.

Q. If a nurse did give the wrong medication, or failed to give medication, then that nurse would not be reliable?

A. That's not the whole of it. I would more consider that a matter of the clinical competence, in that --

Q. (Interposing) -- But it would bear on the nurses reliability?

MR. SMITH: I object. I would ask that the witness be allowed to answer. This is not an argument.

MS. WILLIAMSON: I'm sorry. Go ahead.

THE WITNESS: Whether you give the right medication to a patient, or whatever, is a matter of competence and it's not

necessarily a part of reliability. I think if you were consistently doing that, that might be reliability in some way.

THE COURT: You can be reliable and incompetent, is that what you are saying?

THE WITNESS: No, it's not. Is that what it sounds like?

THE COURT: Yes.

THE WITNESS: I'm sorry. I believe it would relate to reliability.

BY MS. WILLIAMSON:

Q. And if a nurse forgot to give medication at all, failed to give it at all, would that relate to the nurse's reliability?

A. Yes.

Q. If a nurse failed to follow the doctor's instructions, would that relate to her reliability?

A. Yes.

Q. If she made a wrong entry in a patient's chart, would that relate to her reliability?

A. It would, but there would be more issues than just that. You're naming procedures that are common.

Q. Is it fair to say, Ms. Vardiman, that the word reliability involves a whole question of professional competence, doesn't it?

A. And in my mind, professional competence has to do with using good judgment, being healthy and well prepared to come to work, having skill and knowledge of the clinical area that you're working in, being available.

To me, the bottom line of being professionally reliable and competent is being where you're supposed to be, being counted on to be there to give the care to the patients

as you agreed to do.

Q. But reliability does involve professional competence, doesn't it?

MR. SMITH: Objection. Asked and answered.

THE COURT: Sustained.